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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/762,232	02/05/2001	Lorraine Mignault	82223-202	1664

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11/26/2002

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EXAMINER

WILLIS, MICHAEL A

ART UNIT

PAPER NUMBER

1617

DATE MAILED: 11/26/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

09/762,232

Applicant(s)

MIGNAULT, LORRAINE

Examiner

Michael A. Willis

Art Unit

1617

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 08 November 2002.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1,2,5-9,17-22 and 24-26 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,2,5-9,17-22 and 24-26 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                  | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s). _____  |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)         | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ | 6) <input type="checkbox"/> Other:  |

### **DETAILED ACTION**

Applicant's amendment of 8 November 2002 is entered. Claims 3 and 4 are cancelled. Claims 1, 5-8, 17-18, and 20 are amended. Claim 26 is added. Claims 1-2, 5-9, 17-22, and 24-26 are pending. Any previous rejections that are not restated in this Office Action are hereby withdrawn. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

#### ***Request for Continued Examination (RCE)***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114.

#### ***Response to Arguments***

Claims 25-26 are rejected under 35 USC 102(b) as being anticipated by Weed (Wise Woman, Herbal Healing Wise; 1989, pp. 192-205) for reasons as stated previously (restated as follows):

Weed discloses hot water extracts of oatstraw (see page 205). The extracts are in the form of oatstraw baths. Weed states "Use an oatstraw footbath to soak away stink, sweat, cold, and pain from you tender tootsies," (page 205). For purposes of examination, water as disclosed by Weed is considered to be inherently equivalent to "filtered and magnetized water" as claimed in claim 2.

Applicant argues that the claims as amended are directed to extracts prepared by steeping oatstraw in boiling water and then preparing a lotion from the extract. Applicant argues that adding a compound to bath water does not teach preparing a lotion for topical application. In response, the

recitation "a topical lotion for relieving pain, swelling or inflammation" has not been given patentable weight because the recitation occurs in the preamble. A preamble is generally not accorded any patentable weight where it merely recites the purpose of a process or the intended use of a structure, and where the body of the claim does not depend on the preamble for completeness but, instead, the process steps or structural limitations are able to stand alone. See *In re Hirao*, 535 F.2d 67, 190 USPQ 15 (CCPA 1976) and *Kropa v. Robie*, 187 F.2d 150, 152, 88 USPQ 478, 481 (CCPA 1951). Similarly, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. See *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963).

Applicant argues that an aqueous extraction at boiling versus 35-45°C will yield differences in specific compounds, their concentration, and their stability. However, the claims are directed to "steeping oatstraw in water heated until hot and tiny bubbles have formed" instead of boiling water. Even if applicant's statement that the claims are directed at boiling water is accepted, the reference teaches the use of boiling water. "Boil water and pour over oatstraw in a large tub. When cooled sufficiently, bathe." (page 205, line 25).

Applicant argues that "filtered and magnetized water" is patentably distinct in that during such process, the hydrogen ions and dissolved minerals in the water become charged, causing a temporary separation of these minerals and molecular water clusters resulting in water with increased clarity and softness, and reduced surface tension. The examiner can find no support in scientific literature that "magnetized" water differs from "water" in any way. Therefore, such limitation is not given patentable weight. While the examiner concedes that filtering water can remove impurities from water, it is not clear that the water disclosed in the reference contains such impurities. In other words, even ordinary tap water is inherently processed in such a way as to meet the broad limitation of "filtered".

In response to the previous rejections as restated above, applicant submits affidavits from the inventor and Rick Green of POS Pilot Plant Corporation as well as "Magnetized Water Treatment Demystified" and US Pat. 5,905,265.

The affidavits of the inventor and Rick Green are not convincing of a difference between magnetized water and non-magnetized water. It is noted that the affidavits of the inventor and Rick Green are directed at a distinction between **deionized** water and "magnetized" water. The examiner accepts the data of pH and conductivity differences

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between deionized water and "magnetized" water. However, the differences between deionized water and "magnetized" water are not relevant to the question at hand, which is whether or not "magnetized" water differs from un-magnetized water of the prior art. In other words, the differences in pH and conductivity between deionized water and "magnetized" water cited by the inventor and Rick Green are of the same nature and scope as the expected differences between deionized water and normal (i.e. un-deionized) water.

Applicant's assertion that the literature contains support for the differences between magnetized water and non-magnetized water is not convincing. While the Examiner is not able to refute the data presented in US Pat. 5,905,265, it is noted that the subject matter of the patent is homeopathic treatment, which is notoriously controversial and generally discredited in the scientific community. Furthermore, the data presented in US Pat. 5,905,265 are hardly convincing of a general difference between "magnetized" and un-magnetized water. Rather, the data merely shows that the inventor was able to coax out a difference between samples in a very specific test. The rationale put forth by the reference involving patterns or combination of oscillations copied from herbs or pollen onto substrates in order to treat allergy symptoms (see col. 1, lines 12-43) is contrary to the mainstream principles of science and Western medicine and borders on nonsense. With respect to the reference "Magnetic Water Treatment Demystified" supplied by applicant, such reference will not be considered, as the date and source of the publication are not provided.

It is the position of the examiner that arguments with respect to differences between magnetized and un-magnetized water are extremely unlikely to be convincing, given the lack of published peer-reviewed data in credible journals and the rejection of such arguments by the scientific community. While the examiner cannot prevent the use of the term "magnetized" in otherwise allowable claims, any claims that differ from the prior art only due to the term "magnetized" will continue to be rejected over the prior art.

Claims 1-2, 5-9, 17-22, and 24-26 are rejected under 35 USC 103(a) as being unpatentable over Weed (Wise Woman, Herbal Healing Wise; 1989, pp. 192-205) in view of Puchalski, Jr. et al (US Pat. 4,690,818) and Jakobson et al (US Pat. 5,397,497) for reasons as stated previously. As stated previously, arguments directed at the combination of references would be considered favorably. For example, an argument that the references lack motivation to combine may suffice in convincing the examiner to withdraw the rejection under 103(a). As no such arguments have been presented, the rejection is maintained.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael A. Willis whose telephone number is (703) 305-1679. The examiner can normally be reached on alt. Mondays and Tuesday to Friday (9am-6:30pm).

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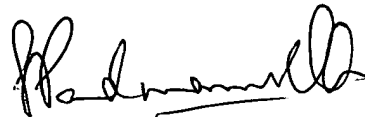
If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreeni Padmanabhan can be reached on (703) 305-1877. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9306 for regular communications and (703) 872-9307 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1234.



Michael A. Willis  
Examiner  
Art Unit 1617

maw  
November 21, 2002



SREENI PADMANABHAN  
PRIMARY EXAMINER

11/24/02